IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1985 OF 2005

M/s. Arhur Frank & Ors. ... Petitioners

Vs.

M/s. Patel India Pvt. Ltd. ... Respondents

Mr. P.S.Dani for the petitioners.

Mr. B.P. Colabawalla for the respondents.

CORAM: SMT. RANJANA DESAI, J.

DATED: 29TH APRIL, 2005.

P.C.:-

1. The original defendants in R.A.E. Suit No.455/869 of 2004 have challenged in this writ petition order dated 3/3/2005 passed by the Small Causes Court at Bombay on Interim Notice No.515 of 2005.

2. The interim notice was taken out by the defendants for a direction to the plaintiffs to delete the statements made in examination-in-chief on affidavit by PW-1, which are not in consonance with the plaint. Mr. Dani, the learned counsel for the petitioners contended that the averments made in the affidavit of PW-1 travel beyond the scope of the plaint. He submitted that in the nature of things, the defendants could not have controverted those averments in their written statement.

Therefore, the defendants cannot cross-examine the plaintiffs' witness on those statements. This will severally prejudice the defendants and, therefore, the impugned order needs to be set aside.

3. If indeed the plaintiffs have filed an affidavit which travels beyond the scope of the plaint, then it is possible that if the defendants are not permitted to cross-examine the plaintiffs' witness on those aspects, they will be prejudiced. In the facts and circumstances of the case, therefore, the defendants will have to be permitted to cross-examine the plaintiffs' witness in respect of the averments made in the said affidavit which are not found in the plaint. If any new case is tried to be made out in the affidavit, the defendants must be given a chance to meet it effectively. In this connection, I may usefully refer to the judgment of the Supreme Court in **Ameer Trading Corporation Ltd. v. Shapoorji Data Processing Ltd., AIR 2004 SC 355**. I may quote the relevant observations of the Supreme Court.

> "32. The matter may be considered from another angle. Presence of a party during examination-in-chief is not imperative. If any objection is taken to any statement made in the affidavit, as for example, that a statement has been made beyond the pleadings, such an objection can always be taken before the Court in writing and in

> any event, the attention of the witness can always be drawn while cross-examining him. The defendant would not be prejudiced in any manner whatsoever the examination-in-chief is taken on an affidavit and in the event, he desires to cross-examine the said witness he would be permitted to do so in the open Court."

4. In view of this, in my opinion, following order will meet the ends of justice.

5. The trial court shall permit the defendants to cross-examine the plaintiffs' witness in respect of the allegations made in the affidavit which are beyond the scope of the plaint. While finally deciding the suit, the trial court will take into consideration the grievance made by the petitioners that by filing the examination-in-chief on affidavit, the plaintiffs have travelled beyond the scope of the plaint. The trial court will deal with the case without being influenced by any of the observations made by it in the impugned order.

6. All contentions of both sides are kept open.

7. Petition is disposed of in the aforestated terms.

(SMT. RANJANA DESAI, J.)